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ABSTRACT

Due process of law has never been defined by the Supreme Court in so many words, the Court choosing to define that term on an inclusion/exclusion basis as it goes along. The author traces the historical development of the due process concept, and discusses cases where due process has affected the rights of those involved in the educational process. The author notes that the most pressing problems coming up which involve due process of law are of two varieties: (1) those in which students claim lack of due process where punishments and expulsions are involved; and (2) those in which the classification system used by schools to group children for instructional and other purposes are being challenged. (Author/JF)

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DUE PROCESS AND ITS HISTORICAL DEVELOPMENT IN EDUCATION

M. Chester Nolte*

The men, women and children who are making educational history today are not the Horace Mann's, the William H. McGuffye's, nor even the John Dewey's, imposing as are the contributions of these Great Americans to our nation's educational progress. Rather, the shakers and movers of our time in education are the little people, those singular individuals who, through luck or chance or the fickleness of fate, just happened to be at the right place at the right time to be swept up inadvertently in the whirlwinds of change. None of these individuals planned it that way--they did not set out deliberately to change history; none of them was well-known at the time they appeared on the scene and even afterwards they remain relatively obscure; and none of them was thinking of immortality or fame when he acted as he did. Yet such is the tenor of the times--we move from minority law to majority law is the formula--that in challenging the status quo each of these unknown individuals left his mark on the pages of history writ large for all to see and heed, and in so doing, opened each a new era in the annals of our time.

Victor Hugo wrote that "greater than the tread of mighty armies is an idea whose time has come." Perhaps the time had come for Henry Meyer, of German extraction, living in Nebraska. Meyer was a teacher in the Zion Parochial School shortly after World War I. Americans had been locked in that war in a bitter

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struggle to make the world safe for democracy. It seemed reasonable, therefore, when in 1919, the Nebraska legislature passed a statute which prohibited the teaching of any subject in any language except English. Meyer, who used a German bible history book as a text for reading, was convicted of violating the statute. He brought suit challenging the constitutionality of the law. The Supreme Court held that the statute denied him, without due process of law, his "liberty" to teach. Writing for the majority, Justice McReynolds acknowledged that the State has enormous power in educational affairs, extending even to compelling attendance in school and to regulating the curriculum. But that power, wrote McReynolds, is far from absolute. No emergency existed which would render knowledge of some language other than English "so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed." The conclusion was that the statute was arbitrary and without reasonable relation to any end within the competency of the State to enforce.[1]

Perhaps the time had come for the idea that all Americans should be seen as individuals and not judged by the color of their skins when Mrs. Rosa Parks refused to give up her seat on a city bus in Montgomery, Alabama. She was riding home from work on December 1, 1955, and she was tired. She is small and she is quiet, and to look at her today you would not suspect that such a tiny individual could change the course of history, but she did. She was exhausted, so when the bus driver ordered her to give a white man her seat, she looked at the bus driver, and she said "No." That was the beginning. Mrs. Parks had decided

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[1]Meyer v. Nebraska, 262 U.S. 390 (Nebr. 1923).

that the day had come that she would not be stepped on any more. She was arrested and thrown off the bus, and her story spread, when people heard how one black woman was brave enough to say no, the organization of the spirit which we know as the civil rights movement was born. It all began to happen at the time that Rosa Parks decided that someone had to be the first to say that the old days were over. She was arrested and taken off the bus, and because of her the world will never be the same again.

Perhaps the time had come for the idea that children in school have constitutional rights to freedom of expression when John F. Tinker, 15 years old and his sister, Mary Beth Tinker, a 13 year old junior high school student, challenged a ruling by Des Moines principals that anyone wearing a black armband in school to protest the war in Vietnam would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Although they knew of the regulation, Mary Beth and Christopher Eckhardt, a 16 year old friend, wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. The district court upheld the principals' rule on the ground that it was reasonable in order to prevent disturbance of school discipline.[2] The district court dismissed the complaint. After appeal to an equally divided Eighth Circuit Court of Appeals, the Supreme Court took the case on certiorari.[3]

The holding of the United States Supreme Court is well known to you so I need not expand on it here.[4] Suffice it to say that if there is a lodestar in the due process constellation today, it is the Tinker case decided in 1969.

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[2]Tinker v. Des Moines Ind.Comm.Sch.Dist., 258 F.Supp. 971 (Iowa 1966).
[3]383 F.2d 988 (1967), cert. granted, 390 U.S. 942 (1968).
[4]393 U.S. 503 (1969).

It says, in effect, that even the least among us is free to challenge the awesome power of the sovereign State, which, in the absence of a showing of disruption, is constrained from limiting individual liberties by a mere desire, as the Court said, "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. . . .In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." The decision has spawned a raft of similar cases to the effect that students carry with them into our public schools their full complement of constitutional rights which the State may limit only on proof that an overriding public purpose is to be served by giving "valid reasons" why the State must act as it does. "Due process," says the Supreme Court, "is not for adults alone."

Historic View of Due Process of Law

The twenty years between the court's holding that "separate but equal facilities for the races are inherently unequal" (Brown, 1954) and the present represent the enlargement of the concept of equal protection of the laws. Now the emphasis has changed to due process of law, a concept which is not entirely new to our form of government. When an individual says that the government cannot deprive him of "life, liberty or property without due process of law," he is reaching back not only into our history, but that of other civilized peoples before us. The humble teacher of Galilee included in his sermon on the mount [5] the admonition that "all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets."

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[5]Gospel of St. Matthew 7:12 (King James Version).

The doctrine of fundamental fairness embodied in the Golden Rule was most certainly incorporated in England's Magna Carta (1215) where the barons, in referring to King John, told each other, "We'll make him an offer he can't refuse." Article 39 to which they referred read as follows: "No free man shall be seized or imprisoned or outlawed, or in any way destroyed. . .excepting by the legal judgment of his peers, or by the law of the land." In subsequent English statutes purporting to re-enact and in commentaries elucidate the principles of Magna Carta, the reference to "legal judgment of his peers" and "laws of the land" are treated as substantially synonymous with "due process of law." The early colonial documents frequently reflected the language of Magna Carta, and in the Fifth Amendment (ratified in 1791) the provision that "no person shall be deprived of life, liberty or property without due process of law" was prominently supportive of the idea that individuals should be protected from government and that this should be a fundamental unalienable freedom guaranteed in the Bill of Rights itself. The phrase was later repeated following the Civil War when the prohibition against deprivation of due process which applied in the Bill of Rights only to the federal government, was extended to read "No state shall deprive any person of life, liberty or property without due process of law."[6]

Although the Fourteenth Amendment says that "no state. . ." shall deprive any person of his rights, it also makes national citizenship primary and State citizenship derivative therefrom. Thus, every child in school as well as out in the view of the Amendment is entitled to the privileges and immunities "of citizens of the United States" first and citizens of the State

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[6]Adopted as Amendment XIV in 1868.

secondarily. The net effect of the Fourteenth Amendment on school children, therefore, is to provide them with the right to due process of law where they are allegedly deprived of life, liberty or property by official State action.

Originally, the Bill of Rights placed restrictions only upon the Congress, but with the coming of the Fourteenth Amendment in 1868, the police powers of the State were similarly restricted. In the 77 years between the adoption of the Bill of Rights and the Fourteenth Amendment, the Supreme Court used the due process clause (V Amendment) only once to invalidate a statute, the Dred Scott decision of unhappy memory.[7] Since 1868, however, the High Court has relied in some 350 cases on the Due Process Clause of the Fourteenth Amendment in reaching its decisions.

The following generalizations seem appropriate in the light of Supreme Court decisions over the years:

1. The Constitution is truly what the Supreme Court says it is, nothing more or less. As social pressures change, so do judicial sensitivities to the societal needs of our people. Thus, an idea whose time has come often is expressed in the form of a Supreme Court decision before it reaches down to claim the majority of the people's loyalty. Under this rubric, the Brown[8] idea that separate but equal is inherently unequal became majority law some ten years later in the Civil Rights Act of 1964. Depending upon the question, the Supreme Court is from 10 to 20 years ahead of the majority opinions which it later influences and in fact engenders.

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[7]Dred Scott v. Sandford, 19 Howard 303 (1857).
[8]Brown v. Board of Education, 347 U.S. 483 (Kans. 1954).

2. A 20-year period of judicial activism (1953-1973) in which the Supreme Court determines educational policy began with the Warren Court, still continues unabated, and may be expected to continue indefinitely. The model here is from minority law to majority law, from unwritten law to written law, from judge-made law toward law enacted by legislative bodies. Despite doomsaying by legislative purists, there is a certain predictability in all this to one who becomes familiar with the reasoning of the Court, and its propensity to pick and choose which cases it will hear or not hear.

Changes in social philosophies will come when they do come not from changes in the thinking of incumbent members, but from the new faces named to the Court. In only a single case, for example, in the 1973 term of the Supreme Court, that involving food stamps, were the four Nixon appointees out-voted by the other five justices. This is pointed to by some observers as a "conservative trend" on the Court, a conclusion open to question in the light of the abortion and Amish compulsory attendance decisions, but in line with the Rodriguez, and electronic surveillance cases. To the latter problem, to the question of whether the President, through the Attorney General, may legally undertake "electronic surveillance" of individuals under guise of national security, without the judicial equivalent of a search warrant, the Nixon Four were joined by all the others voting on the question. Their answer was a resounding negative. "We have as much or more to fear from the erosion of our sense of privacy and independence by the omnipresent electronic ear of the Government as we do from the likelihood that fomenters of domestic upheaval will modify our form of governing," wrote Mr. Justice Douglas on that occasion.[9]

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[9] U.S. v. U.S.Dist. Ct., 407 U.S. 152 (1972).

You may justifiably be confused where various justices form a bloc and vote along those lines, but a pattern is emerging which is more or less predictable. In the 1972-73 term of the Court, 31 decisions were by the narrow margin of 5-4, or about one out of every five cases. In those 31 decisions, in 15 or about half, the Nixon Four (Burger, Blackmun, Powell and Rehnquist) found an ally in Justice White to form the majority. In two other cases, including Rodriguez, the four were joined by Justice Stewart. Considering the size of the problems which society places upon the Court, it is noteworthy that even though the Nixon Four may be considered "conservative" by some, the pattern is that the scales of justice are heavily weighted on the side of the individual citizen who cnallenges the intrusion of government into his life and liberties.

3. The Supreme Court has come to use what it now calls selective incorporation, a cause to which Justice Black devoted a lifetime on the bench. In layman's talk, this simply means that the First Amendment and the Fourteenth Amendments are read together, that is, incorporated. The selective part of the doctrine means that the Court picks and chooses which cases it will hear and which it will not hear. Yet this is not such a puzzle as it may seem. Where there is confusion in the courts below, the Court will tend to accept test cases to clear up this ambiguity--the rule here seems to be that "the law cannot bear a double standard." Cases in point are Roth and Sindermann, in which the circuit courts had reached opposite conclusions on the right of non-tenure and tenure teachers to continuing employment, and the LaFleur and Cohen cases which dealt with the legality of certain maternity leave policies.

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[10]Board of Regents v. Roth, 92 S.Ct. 2701 (Wisc. 1972) and Perry v. Sindermann, 92 S.Ct. 2694 (Tex. 1972); Cleveland Board of Educ. v. LaFleur, 42 USLW 4186 (Jan. 21, 1974) and Cohen v. Chesterfield Co. Sch.Bd., 42 USLW 4186 (Jan. 21, 1974).

Using selective incorporation, the Court has still not heard a high school hair case, although the score is about even between plaintiff boys and defendant school boards. In a case where it was claimed that the loss of schooling would cause irreparable damage unless legal relief was forthcoming immediately, Justice Hugh Black tersely ruled that "the federal judiciary has more important things to do than to decide on the length of the hair of schoolboys." Since there is no major dissention between the courts below on the question of corporal punishment, the Court has also avoided handling that tricky question, but may have to step in if some federal judge decides that such treatment amounts to cruel and inhuman punishment.

Ordinarily, the High Court will avoid reaching a constitutional issue where there is an intermediate peg to hang its decision on. In Lau v. Nichols,[11] for example, decided by the Court on January 21, 1974, the unanimous Court held that failure by the San Francisco board to deal with the problem of Chinese speaking children in schools was a violation of Section 601 of the Civil Rights Act of 1964 which bans discrimination based on grounds of race, color or national origin "in any program or activity receiving federal financial assistance." It was therefore unnecessary for the Court to reach the equal protection question, since it had sufficient grounds on which to base its decision solely on the Section 601 violation.

Before the Court to be decided this term are the following cases: a) a Missouri case on that State's plan to provide state funds to private and parochial schools; b) busing across district lines to achieve racial

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[11] 42 USLW 4165 (Jan. 21, 1974).

balance; c) whether school officials at Kent State University are liable for wrongful death and injuries in a confrontation between national guardsmen and students more than four years ago; and d) some questions posed by reverse discrimination: 1) whether setting quotas for admission to the University of Washington law school and for employment as principals in San Francisco adversely affect white males because preference is given in the quotas to minority individuals. Any way you view these cases, they are of Number One priority and magnitude, destined to set the tone for schools to follow for many months to come.

Due process and the Court. The most pressing problems coming up which involve due process of law are of two varieties: 1) those in which students claim lack of due process where punishments and expulsions are involved; and 2) those in which the classification system which schools use to group children for instructional and other purposes are being challenged. The underlying legal issues in the light of the Court's selective incorporation of the substantive rights in the First Amendment and the due process procedural guarantees in the XIV Amendment will now be explored.

"Due process of law" has never been defined by the Supreme Court in so many words, the Court choosing to define that term on an inclusion/exclusion basis as it goes along. The Fifth Circuit Court of Appeals [12] said this in respect to whether due process of law was violated where children were subjected in the Dallas Public Schools to corporal punishment without a hearing: "Administering corporal punishment without due process of law is not inherently un-

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[12]Ware v. Estes, 328 F.Supp. 657 (Tx. 1971), affirmed, 458 F.2d 1360 (1972), cert. denied, _____U.S._____(1972).

constitutional, because if the punishment is unreasonable and excessive, it is no longer lawful, and the perpetrator of it may be criminally and civilly liable. The law and policy do not sanction child abuse." The Supreme Court denied certiorari, thus, in effect, upholding the Circuit Court of Appeals.

The Gallup Poll for the past five years shows discipline to be the problem mentioned by the most respondents in four our of the five years (the other problem was school financing).[13] The traditional ways of disciplining children seem to be undergoing considerable erosion, leading some administrators to lament that they have the responsibility for student conduct without the rights and powers which should accompany the responsibility. Yet the courts seem reluctant to do away with corporal punishment, fearing, no doubt, that that form of punishment is necessary to maintain a semblance of law and order in public schools today.

Take compulsory attendance, even that has a crack in it. The Supreme Court said in Wisconsin v. Yoder[14] that "however strong the State's interest in universal compulsory attendance, it is by no means absolute to the exclusion or subordination of all other interests," thus upholding an Amish farmer's right to keep his child home after the 8th grade although he was not yet 16, the age in Wisconsin for legally leaving school. Several cases are to the effect that depriving a student of even 5 to 6 days of time away from school without a hearing amounts to a deprivation of civil rights.[15] Other cases by federal courts deny the right of the board of education to exclude school children for marriage and pregnancy alone.[16] In Omaha, where successive suspensions sometimes ran up to 30 days, the federal district judge

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[13]Stanley Elam (ed). The Gallup Polls of Attitudes Toward Education, 1969-1973, Bloomington: Phi Delta Kappa, 1973, p. 2.

ordered the board to devise a due process plan to insure that due process of law was accorded to all those students who were affected by the suspension policy.

We have the words of the Supreme Court on the importance of an education to juveniles growing up in today's world:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures, boards of education being no exception. That boards are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. West Va. St.Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
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> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms. Brown v. Board of Education, 347 U.S. 483 (Kans. 1954).

That means not only that where the State deprives a child of several days of schooling, it must bear the burden of proof that his presence is detrimental to the educational program, but it must also do so without arbitrariness, since the due process clause is a hedge against compulsive and retaliatory action on the part of State officials. Thus, knocking down grades for non-academic reasons[17], revoking a student's athletic letter[18], and barring a student from graduation exercises[19] were all declared to be arbitrary actions on the part of school boards, hence impermissible. Even guilt by association is taboo. In a case in which the Iowa High School Athletic Association

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[14]92 S.Ct. 1526 (Wisc. 1972).

[15]Fielder v. Bd. of Educ., 346 F.Supp. 722 (Nebr. 1972); Williams v. Dade Co. Sch. Bd., 441 F.2d 299 (Fla. 1971).

[16]Davis v. Meek, 344 F.Supp. 298 (Ohio 1972); Ordway v. Hargraves, 323 F.Supp. 1155 (Mass. 1971).

[17]Minorics v. Bd. of Educ., N.J. Comm. of Educ. Decision, 1972.

[18]O'Connor v. Bd. of Educ., 316 N.Y.S.2d 799 (1970).

[19]Ladson v. Bd. of Education, 323 N.Y.S.2d 545 (1971).

rule making ineligible any student who knowingly rides in a car where beer is being consumed, while school is not in session, was being challenged by a boy who was not himself drinking beer, although he was riding in a car where others were doing so. The court held that such a rule denies due process of law, since every person who loses a year of eligibility or even a semester should be allowed to appear and face his accusers and tell his side of the story.[20]

Classification problems. A continuing hassle is going on relating to the problem of proper classification of students. In general, three classes of problems arise here: 1) exclusion of the student altogether from certain programs or from all programs; 2) misclassification due to use of tests or other criteria not related to the population being tested; and 3) tracking which locks students irretrievably into a program from which they cannot escape. Time does not allow a full exploration of these problems other than to give illustrations of the various classification problems just mentioned.

Exclusion may be either entire or functional, that is, the student may be physically excluded from the school or may be present in school, but not able to function in the environment provided for him. In the first instance, a federal district court in Pennsylvania held in that excluding mentally retarded children from school, the State must provide a hearing before postponing the admission of any child into the system,[21] and also must provide an automatic hearing every two years to re-evaluate assignments away from regular classes. With regard to the functionally excluded child, there are several bi-lingual cases now winding through the courts which will test what the school owes

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[20]Bunger v. Iowa H.S.Ath.Assn., 197 N.W.2d 555 (1972).

[21]Pennsylvania Assoc. ofRetarded Children v. Commonwealth of Pa., 334 F.Supp. 1257 (1971), affirmed 343 F.Supp. 279 (1972).

its citizen-students enrolled in school. The Peter W. Doe case in San Francisco is representative of a line of cases which if successful may open the door to considerable litigation on the subject of what the school owes children in the environment to which they have been assigned by official State action.[22]

Misclassification of students occurs where the tests are normed on populations other than the one being tested, resulting in discrimination.[23] Black students in California may no longer be placed in classes for the educable mentally retarded on the basis of I Q tests which lead to racial imbalance in the composition of those classes. Similarly, students who are assigned to certain tracks in schools are entitled to due process of law in the making of such assignments. Here you, the agent of the state, must prove that what you do is to the best interests of the child and that the environment to which you have assigned him is the very best which is possible under the circumstances given in the case.

Schools for Tomorrow

Needless to say, these changes I have mentioned make the practice of school administration in the latter quarter of our century an entirely new ball game. The Constitution has gone to school, and our once protected domain has been invaded. Now opinions are not enough in court; you must go fully prepared to bear the burden of proof that your actions, which are the actions of the sovereign State, are justifiable in the light of the circumstances. If there

[22]In Lau v. Nichols, 42 USLW 4165, decided January 21, 1974, although the Supreme Court did not reach its decision on the basis of the Fourteenth Amendment, it did say that "under these state-imposed standards, there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."

[23]Larry P. v. Riles, 343 F.Supp. 1306 (Cal. 1972).

is a fixed star in the due process firmament, it is that due process is entirely circumstantial--it must be fitted to time, place and the facts. Since the State must now justify the constitutionality of its actions, you must be prepared to show that limiting individual freedoms was necessary--that there was no other way it could be done--and that your actions were designed to avoid disruption, or an invasion of the rights of others, or to skirt a clear and present danger. Believe me, to one not trained in the gathering of factual evidence, this may be a very heavy burden indeed.

The State must exercise only that limited power which is necessary to carry out its purposes--to educate the young, to maintain an on-going school system which is democratic, open, fair, reasonable, experimental, and in which students are involved in the day to day solving of problems and the making of decisions. What this school of tomorrow will look like is not clear, but it will not be custodial, as in the past, nor paternalistic, nor indeed rigid. The Supreme Court has said that "state-operated schools may not be enclaves of totalitarianism," nor may students be considered as"closed circuit recipients" of only that which the state wishes to teach them.

John Curran[24] stated the problem pretty well when he wrote in 1790, the year before the adoption of the Bill of Rights: "The condition upon which God has given liberty to man is eternal vigilance." It has taken our society some 200 years to learn that lesson; it is ironic that our generation should be the one to face up to its moral commitment in the schools.

Mrs. Rosa Parks is still surprised that her individual act became such an important moment in the course of the nation's events. "My mother

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[24]John Philpot Curran, Speech Upon the Right of Election, July 10, 1790.

taught me about the idea of freedom," she says. "She told me that I should never feel inferior to any person because of my color. She told me to respect myself." There may be a lesson in that remark for school administrators. The kind of respect which we had--the paternalism of the entrenched establishment--is no longer appropriate to today's educational scene. We must build a new respect, one based on fairness and enlightenment. We must act as the conscience of this generation against possible inroads of government, because government is impersonal and has no conscience--only men and women have conscience.

Emile Zola was the man who redressed one of the great injustices in history, the Dreyfus affair. When he died, his fellow author Anatole France kneeled at his coffin and said: "He was a moment in the conscience of history." Today we too can become a moment in the conscience of history when we assure students and teachers that their rights will be maintained even at the cost of inconvenience and administrative discomfiture. To do any less would be to deny the process which is due.

You may recall the story of the great French general, Marshal Louis Lyautey, who once asked his gardener in Algeria to plant a tree. The gardner objected saying, "Marshal, this tree is slow-growing and will not reach maturity for a hundred years." Lyautey replied, "In that case, there is no time to lose--plant it this afternoon."

- 30 -